LIBRARY
SUPREME COURT, U.S.

Office Supreme Court, U.S.
FILED
AUG 21 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1957

No. [redacted] 214

SCHWING MOTOR COMPANY, INCORPORATED,
Petitioner,

v.

HUDSON SALES CORPORATION, HUDSON MOTOR CAR COMPANY, BANKERT HUDSON, INC., MARTIN A. BANKERT, FRANK BURNHAM AND CLAUDE W. MARGETTS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM L. MARBURY,
JOHN MARTIN JONES, JR.,
1000 Maryland Trust Building,
Baltimore 2, Maryland,
RICHARD W. LARWIN,
11th Floor,
Ford Building,
Detroit, Michigan,
Attorneys for Hudson Sales Corporation, Hudson Motor Car Company and Frank Burnham, Respondents.

The Daily Record Co., Baltimore 3, Md.

INDEX

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
STATEMENT OF THE CASE	2
NO GROUNDS EXIST FOR GRANTING THE WRIT:	
I. The Question Involved is Not Novel	4
II. There Is No Conflict Of Decision	6
III. The Decision Below Was Not Based Upon Unwarranted Factual Assumptions	11
IV. The Decision Below Was Clearly Correct	12
CONCLUSION	17

TABLE OF CITATIONS

Statutes

Section 1 of the Sherman Anti-Trust Act, Act of July 20, 1890, Chap. 647, Sec. 1, 15 U.S.C.A. 1	3, 7
Section 2 of the Sherman Anti-Trust Act, Act of July 20, 1890, Chap. 647, Sec. 2, 15 U.S.C.A. 2	3, 9

Cases

Abouaf v. J. D. & A. B. Spreckels Co., 26 F. Supp. 830	15
Albert Pick-Barth Co., Inc. v. Mitchell Woodbury Corp., 57 F. 2d 196	6, 7, 8
American Federation of Tobacco Growers, Inc. v. Neal, 183 F. 2d 869	6
Apex Hosiery Co. v. Leader, 310 U.S. 469	9
Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824	15, 16

	PAGE
Bascom Launder Corp. v. Telecoin Corp., 204 F. 2d 331	4
Black and White T. & T. Co. v. Brown and Yellow-T. & T. Co., 276 U.S. 518	4
Boro Hall Corp. v. General Motors Corp., 124 F. 2d 822	14
Brosious v. Pepsi-Cola Co., 155 F. 2d 99	14
Delaware Lackawanna & Western Railroad Co. v. Town of Morristown, 276 U.S. 182	4
District of Columbia Citizen Pub. Co. v. Merchants & Manufacturing Assn., Inc., 83 F. Supp. 994	16
Donovan v. Pennsylvania Co., 199 U.S. 279	4
Dublin Distributors, Inc. v. Edward & John Burke, Ltd., 109 F. Supp. 125	16
Eastern States Retail Lumber Dealer's Assn. v. U.S., 234 U.S. 600	6
Fargo Glass & Paint Co. v. Globe American Corp., 201 F. 2d 534	4, 14
Feddersen Motors v. Ward, 180 F. 2d 519	14, 16
Ford Motor Co. v. Benjamin E. Boone, Inc., 244 Fed. 334	10, 12
Forgett v. Scharf, 181 F. 2d 754	7
Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F. 2d 484	6
Glenn Coal Co. v. Dickinson Fuel Co., 72 F. 2d 885	16
Hudson Sales Corp. v. Waldrip, 211 F. 2d 268	8, 14, 15, 16
Interborough News Co. v. Curtis Publishing Co., 225 F. 2d 289	16
Interstate Circuit, Inc. v. U.S., 306 U.S. 208	6
Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 214 F. 2d 891	16
Milgram v. Loews, Inc., 192 F. 2d 579	6
Nelson Radio & Supply Co., Inc. v. Motorola, Inc., 200 F. 2d 911	14
Neumann v. Bastian-Blessing Co., 71 F. Supp. 803	15

PAGE

Packard Motor Car Co. v. The Webster Motor Car Co., 243 F. 2d 418 5, 14, 15

Riedly v. Hudson Motor Car Co., 82 F. Supp. 8 14, 16

Roseland v. Phister Mfg. Co., 125 F. 2d 417 7

Sager Glove Corporation v. Bausch & Lomb Optical Co., 149 F. 2d 1 7

Shotkin v. General Electric Co., 171 F. 2d 236 14

U. S. v. Addyston Pipe & Steel Co., 85 Fed. 271 4

U. S. v. duPont de Nemours & Co., 351 U.S. 377 10, 11

U. S. v. Masonite Corp., 316 U.S. 265 6

U. S. v. Socony-Vacuum Oil Co., 310 U.S. 150 6, 7

Webster Motor Car Co. v. Packard Motor Car Co., 135 Fed. Supp. 4 4

White Bear Theatre Corp. v. State Theatre Corp., 129 F. 2d 600 6, 7

William Goldman Theatres, Inc. v. Loew's, Inc., 150 F. 2d 739 6

Other Authorities

Annual Antitrust Review, Milton Handler, The Record of the Association of the Bar of the City of New York, Vol. 11, No. 7, p. 367 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1114

SCHWING MOTOR COMPANY, INCORPORATED,
Petitioner,

v.

HUDSON SALES CORPORATION, HUDSON MOTOR CAR COMPANY, BANKERT HUDSON, INC., MARTIN A. BANKERT, FRANK BURNHAM AND CLAUDE W. MARGETTS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief is submitted on behalf of Hudson Sales Corporation, Hudson Motor Car Company and Frank Burnham, three of the named respondents,[1] in opposition to the petition of Schwing Motor Company, Incorporated, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the Dis-

[1] The two Hudson corporations are hereinafter collectively referred to as "Hudson", and respondents Bankert Hudson, Inc. and Martin A. Bankert are hereinafter collectively referred to as "Bankert".

trict Judge's dismissal of petitioner's amended complaint on the ground that it failed to state a claim upon which relief could be granted.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (THOMSEN, Ch.J.) is reported at 138 F. Supp. 899 and reprinted in the Appendix filed by the petitioner as appellant in the Court of Appeals (at pp. 15-29). The Court of Appeals (PARKER, SOPER and SOBELOFF, J.J.) affirmed the decision in a brief *per curiam* order (239 F. 2d 176, reprinted as Appendix A to the petition) in which the District Judge's opinion was adopted as the opinion of the Court of Appeals.

STATEMENT OF THE CASE

Although somewhat obscured by extraneous and conclusory allegations, the *gravamen* of the amended complaint is that Hudson agreed to give Bankert an exclusive dealership (or, as characterized in the amended complaint, a "virtual monopoly") in the sale of Hudson automobiles, parts, accessories and services within the City of Baltimore, Maryland; and that pursuant to such agreement (or, as characterized in the amended complaint, such "conspiracy") and as a necessary result thereof, the one-year non-exclusive dealership franchises of the petitioner, a Hudson dealer since 1945 under a series of such one-year franchises, and of one other dealer in the City of Baltimore were not extended or renewed (or, as characterized in the amended complaint, Bankert "induced" Hudson not to renew such franchises) after they expired by their own terms on September 30, 1952. In addition, the amended complaint alleged, (1) that the respondents informed petitioner's financing and business contacts that petitioner's franchise would not be re-

newed, (2) that Bankert made an abortive attempt to hire one of petitioner's employees, and (3) that Bankert "induced" Hudson to breach its existing franchise agreement with petitioner by failing to deliver certain automobiles to which petitioner contends it was entitled.

The motive for such actions or non-actions, as alleged in the amended complaint, was the elimination of the petitioner as a competitor of Bankert in the distribution of Hudson products within the City of Baltimore and the establishment of a "virtual monopoly" thereof within such area "in order to obtain higher prices and charges therefor from the public and to render to the public less efficient and less convenient service at such higher costs." Thus, the amended complaint purports to allege that the respondents conspired (1) to restrain trade in Hudson products moving into the City of Baltimore, and (2) to monopolize the distribution of Hudson products in the City of Baltimore.

The trial judge held that Hudson could lawfully establish an exclusive dealership for the sale of its own branded products and that the elimination of competing dealers and the channeling of the distribution of its products which necessarily results therefrom do not render such an arrangement, or the agreement between the manufacturer and the exclusive dealer to establish such an arrangement, an unlawful restraint of trade condemned by Section 1 of the Sherman Act or an unlawful monopoly in violation of Section 2 of the Sherman Act. He further held that the other alleged activities — even if actionable under the laws of Maryland — did not convert the case into one cognizable under the anti-trust statutes. Since petitioner expressly disclaimed any purpose to state a cause of action except under the anti-trust laws, Judge THOMSEN concluded that the complaint should be dismissed. The Court of Appeals affirmed and adopted the opinion of Judge THOMSEN.

NO GROUNDS EXIST FOR GRANTING THE WRIT

I.

The Question Involved is Not Novel

In the absence of an intent to monopolize or restrain trade in a given *commodity*, the right of a single manufacturer who does not dominate the market (local or national) in such commodity to establish an exclusive dealership within a single city for the sale of his own *brand* of such commodity in free and open competition with other brands of the same commodity has been uniformly upheld, both at common law[2] and under the anti-trust statutes.[3] And it has been so held even though the very essence of such an arrangement is the prevention or elimination of competition between the exclusive dealer and other former or "would-be" dealers in the brand in question, with the necessary result that the exclusive dealer is thereby given the power to control the price at which the brand in question will move into consumption within the geographical area covered by his franchise, subject only to the competitive pressures exerted by other brands.

So firmly established is this right, both in the decided cases and by virtue of the unchallenged merchandising practices of American business, that no court even questioned it until the decision of District Judge HOLTZOFF in *Webster Motor Car Co. v. Packard Motor Car Co.*, 135 F. Supp. 4. The state of the law prior to Judge HOLTZOFF's decision was very

---

[2] *Donovan v. Pennsylvania Co.*, 199 U. S. 279; *Delaware Lackawanna & Western Railroad Co. v. Town of Morristown*, 276 U. S. 182; *Black & White T. & T. Co. v. Brown & Yellow T. & T. Co.*, 276 U. S. 518.

[3] See for example: *Bascom Launder Corp. v. Telecoin Corp.* (2d Cir. 1953), 204 F. 2d 331, 335, cert. den. 345 U. S. 994; *Fargo Glass & Paint Co. v. Globe American Corp.* (7 Cir. 1953), 201 F. 2d 534 cert. den. 345 U. S. 942; and see *United States v. Addyston Pipe & Steel Co.* (6th Cir. 1898), 85 Fed. 271, 282, aff'd. 175 U. S. 211.

clearly summarized by Professor HANDLER in his 1956 "Annual Anti-Trust Review" wherein he stated, with appropriate citation of authorities:[4]

> "Consonant with the rule at common law, exclusive selling agreements have traditionally been regarded under the Sherman Act as one of the ancillary restraints having a legitimate business purpose. As such, they have been sustained as affording fair protection to the buyer without injuring the public. * * * Where the exclusive is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of *per se* legality.
>
> "Then came Judge Holtzoff's decision invalidating an exclusive distributorship in *Packard*."

While accepting the general principle thus later stated by Professor HANDLER, Judge HOLTZOFF undertook to limit its application to cases in which the manufacturer acted independently and without request from one of the competing dealers. But Judge THOMSEN recognized that any such limitations would require important business decisions to be made in a vacuum and declined to follow Judge HOLTZOFF in this novel departure from accepted principles. After Judge THOMSEN's opinion in the present case had been affirmed by the Court of Appeals for the Fourth Circuit, the Court of Appeals for the District of Columbia reversed Judge HOLTZOFF, in *Packard Motor Car Company v. The Webster Motor Car Company*, 243 F. 2d 418, and quoted HANDLER with approval at p. 240.

Respondents respectfully submit that the question involved is not novel and that the decision below clearly follows well established patterns.

---

[4] *Record of the Association of the Bar of the City of New York*, Vol. 11, No. 7, Oct. 1956, p. 367, at pp. 369-370.

II.

There Is No Conflict Of Decision

Although the petitioner contends that the decision below is in conflict with certain decisions of this Court and of the lower Federal courts, it is significant that no attempt is made to compare the vitally different facts in the cases cited with the facts alleged in the amended complaint. *All* of the cases cited by the petitioner involve conspir-

---

[5] *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (cited at pp. 16 and 22 of the petition) involved a conspiracy between competing oil companies to raise the price of gasoline in "spot market" areas; *Albert Pick-Barth Co., Inc. v. Mitchell Woodbury Corp.* (1 Cir. 1932), 57 F. 2d 96 (cited at pages 16, 17, 22, 27 of the petition) involved a conspiracy by the nation's largest manufacturer of kitchen utensils to drive a competitor out of business and to monopolize the market in kitchen utensils, not the "market" in the defendant's brand of kitchen utensils; *White Bear Theatre Corp. v. State Theatre Corp.* (8 Cir. 1942), 129 F. 2d 600 (cited at pp. 16, 23, 40 of the petition) involved an attempt by a theatre owner to drive the only other theatre in town out of business and thus completely dominate and monopolize the local exhibition of all motion pictures; *U. S. v. Masonite Corp.*, 316 U. S. 265 (cited at pp. 17, 27 of the petition), involved a price fixing combination between a manufacturer and its competitors to maintain the price of the manufacturer's products; *Interstate Circuit, Inc. v. U. S.*, 306 U. S. 208 (cited at pp. 17, 27, 31 of the petition), *Milgram v. Loew's, Inc.* (3 Cir. 1951), 192 F. 2d 579, c.d. 343 U. S. 929 (cited at pp. 17, 27 of the petition) and *William Goldman Theatres, Inc. v. Loew's, Inc* (3 Cir. 1945) 150 F. 2d 738 (164 F. 2d 1021, c.d. 334 U. S. 811 (cited at pp. 17 and 27 of the petition) all involved price fixing agreements and exclusionary conspiracies by eight motion picture distributors who dominated 75-80 per cent of the market and local exhibitors who had a series of local monopolies of first run films; *Eastern States Retail Lumber Dealer's Assn. v. U. S.*, 234 U. S. 600 (cited at pp. 17, 27 and 35 of the petition) involved a conspiracy between competing retail lumber dealers to suppress retail competition by boycotting wholesalers who sold lumber directly to the consumer; *Gamco, Inc. v. Providence Fruit & Produce Bldg.* (1 Cir. 1952), 194 F. 2d 484 (cited at pp. 17, 27 of the petition) involved a conspiracy by competitors who controlled the local warehousing accommodations to exclude a competitor from competition in the local produce market; *American Federation of Tobacco Growers, Inc. v. Neal* (4 Cir. 1950), 183 F. 2d 869 (cited at pp. 17, 27 of the petition) involved a conspiracy by competitors who completely controlled the

acies among competitors to fix prices or divide markets, or attempts to monopolize the national or local market in a given *general commodity* — a far cry from the "conspiracy" alleged in the instant case between a manufacturer and a dealer to establish an exclusive dealership within a single city for the sale of its one minor brand in free and open competition with many other brands of the same commodity.

Coming now to the petitioner's specific contentions with respect to the conflict of decision alleged to exist, the substance of the petitioner's argument set forth in sub-paragraphs A and B of paragraph 1 (pp. 16-17 of the petition) is that the allegations of the amended complaint state a *per se* violation of Section 1 of the Sherman Act, and that the holding to the contrary by the court below is in conflict with decisions of this Court and of lower federal courts.

The petitioner's contention of *per se* violation is based upon general statements that the petitioner has culled from the court's opinion in the case of *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F. 2d 96,[6] which are to the effect that the elimination of a competitor by *unfair or unlawful means* constitutes a *per se* violation of Section 1 of

---

local sale of tobacco to exclude the plaintiff from competition in the local tobacco market; *Forjett v. Scharf* (3 Cir. 1950), 181 F. 2d 754 (cited at p. 28 of the petition) involved an attempt to drive sole competitor out of business and monopolize the whole industry of automatic film development; *Sager Glove Corporation v. Bausch & Lomb Optical Co.* (7 Cir. 1945), 149 F. 2d 1 (cited at p. 28 of the petition) involved a conspiracy by parties dominating the market of lenses for industrial goggles to monopolize the entire industry; *Roseland v. Phister Mfg. Co.* (7 Cir. 1942), 125 F. 2d 417 (cited at p. 28 of the petition) involved a conspiracy by three competitors who were the sole producers of certain fire preventive equipment to divide territory and fix non-competitive prices for entire industry.

[6] Petitioner also cites *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, and *White Bear Theatre Corp. v. State Theatre Corp.*, 129 F. 2d 600, in connection with this contention. However, neither of these cases are authority for the extreme position taken by the petitioner.

the Sherman Act. However, the decision and the principles announced in the *Albert Pick-Barth* case are wholly inapplicable here. In the first place, that case involved the familiar pattern of a corporation holding a dominant position in the industry, which effectively drove out of business a substantial competitor. Nothing of that nature is involved in the case at bar. In the second place, the only "means" alleged in the amended complaint by which it is said that the petitioner was eliminated as a competitor was the non-renewal of the petitioner's expiring franchise agreement,[7] but in *Hudson Sales Corporation v. Waldrip* (5 Cir. 1954), 211 F. 2d 268, (cert. den., 348 U. S. 821), where a similar Hudson dealer franchise agreement was involved, it was clearly held that the dealer had no tenure or right to renewal of such a franchise agreement.

Faced with this problem, petitioner contends that failure to renew its franchise became illegal because of Hudson's agreement, or "conspiracy", with Bankert. Petitioner cites no authority which supports such bare contention and it obviously is not sound because otherwise, as a practical matter, no exclusive dealership can ever be lawfully established. This follows because no manufacturer could safely fail to renew existing franchise agreements in order to establish an exclusive dealership unless he had already entered into a prior agreement with the exclusive dealer, for otherwise he would not be certain that he would have any representation in the area in question after the termination of the existing franchises. To place a small auto-

---

[7] The amended complaint contains allegations of some additional acts from which the petitioner argues that the motive for failure to renew its franchise was to eliminate the petitioner as a competitor and that the non-renewal did not result from exercise of "independent business judgment". However, both the allegations of the amended complaint as well as the argument contained in the petition make it clear that such acts do not constitute the *means* by which the petitioner was eliminated from inter-dealer competition.

mobile competitor such as Hudson into such a straitjacket would be unrealistic, unjustifibly damaging to Hudson's competitive situation, and thus injurious to the public interest.

The respondents believe and contend that the restraint on inter-dealer competition inherent in all exclusive dealerships is not and was never intended to be condemned by the Sherman Act, and that the *means* employed — even if actionable under the laws of a given state — do not render such restraint illegal. *Apex Hosiery v. Leader*, 310 U. S. 469. However, even under the petitioner's theory the only "unfair and unlawful means" was the failure to renew its expiring franchise agreement, which petitioner says was pursuant to an agreement between the manufacturer and the exclusive dealer to grant the exclusive dealership — an indispensible element in the establishment of any exclusive franchise.

The fact of the matter is that exclusive dealerships, whether brought about by the failure to renew existing dealerships or otherwise, have always been uniformly upheld under circumstances such as those presented in the instant case,[8] and the decision below cannot be said to have created a conflict by following such well established principles.

The remaining area of alleged conflict concerns the determination of "relevant market" for the purpose of testing the sufficiency of the amended complaint insofar as it attempts to charge a violation of Section 2 of the Sherman Act. The respondents do not dispute the general proposition that the determination of "relevant market" in any given case is a question of fact and the decision below did not hold otherwise. However, as with any question of fact,

[8] See cases cited *infra*, Section IV, p. 12 *et seq.*

the trial court is not obliged to submit the issue to a jury when, under the circumstances, reasonable men could reach but one conclusion. The petitioner's main objection is that the district court refused to close its eyes to the obvious fact that there were numerous other makes of automobiles reasonably interchangeable[9] with Hudson automobiles and held the relevant market to be the local market in *automobiles generally* and not the local market for the distribution of Hudson automobiles. Not only is the district court's ruling on this point in accord with the case of *Ford Motor Co. v. Benjamin E. Boone, Inc.* (9 Cir. 1917), 244 Fed. 335, but it is also directly in line with this Court's pronouncement in *U. S. v. duPont & Company*, 351 U. S. 377, wherein this Court, almost as if in answer to the petitioner's contention, stated:

> "Every manufacturer is the sole producer of the particular commodity it makes, but its control in the above sense of the relevant market depends upon the availability of alternative commodities for buyers: i.e., whether there is a cross-elasticity of demand between cellophane and the other wrappings. This interchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities. [pp. 380-381]
>
> * * * * * *
>
> "However, this power that; let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. 'Illegal power must be appraised in terms of the competitive market for the product." [p. 393]

[9] The petitioner attacks the district court's ruling on this point on the ground that it was not a matter as to which the court could properly take judicial notice. However, it is interesting to note that although the petitioner devotes several pages of the petition in an effort to have this Court take judicial notice of the reasons why the Hudson automobile should be placed in a class by itself, the amended complaint does not allege any such specialized features.

Were the petitioner's contentions sound, the relevant market in the *duPont* case would have been *not* the market in flexible packaging material (as this Court found) or even the market in cellophane (as the government contended) but rather the market in *duPont cellophane* — a contention which we doubt would have been seriously considered by this Court.

In short, the decision below is not in conflict with any decision of this Court or of the lower federal courts but represents the application of well established principles to the particular facts presented.

III.

The Decision Below Was Not Based Upon Unwarranted Factual Assumptions.

It is said that the District Judge improperly assumed the existence of eleven facts (as outlined on pp. 47-51 of the petition for the writ of certiorari), and thus violated sound principles of judicial administration previously announced by this Court. For the most part those matters are not "factual assumptions" at all. Several of them (Nos. 2, 3, 4 and 5) are correct assertions by the District Judge that in the amended complaint certain matters are not alleged or contended; several others (Nos. 10 and 11) are obviously correct observations; several others (Nos. 6, 7 and 8) are purely argumentative, in complete harmony with proper judicial administration; one of them (No. 9) accurately reflects something that occurred at the hearing before the District Judge (see Appellees' Appendix, pp. 2-3), and the remaining one (No. 1) is nothing more than a statement of a matter of common knowledge which, like the fact that Hudson enjoys only a very small percentage of the automobile market, the court could not ignore without stultifying itself.

IV.

The Decision Below Was Clearly Correct

The respondents do not believe any extended discussion of the merits to be proper at this stage of the proceedings. However, they do feel it appropriate to point out that the decision below was clearly correct and based upon ample authority.

As early as 1917 the Court of Appeals for the Ninth Circuit in the case of *Ford Motor Co. v. Benjamin E. Boone, Inc.*, 244 Fed. 335, surveyed the practice, even then well-established, of granting geographical franchises to automobile dealers and applied principles dictated by authority as well as common sense. The case involved the legality of Ford's method of distribution and its dealership agreements which granted geographical franchises to dealers selected by Ford to the exclusion of others. In reviewing and denying the contention that these matters involved unlawful restraint of trade, the court made the following significant comments (at pp. 341-342):

> "Whatever its merits, the Ford car is not, except in the most remotely relative sense, essential to the well-being of the public or any group thereof, or any individual. There are other automobiles in great variety available to any one who has need and desires to purchase, some cheaper, some more expensive, some less efficient, some more efficient, some less attractive in appearance, others more attractive, Cole Motorcar Co. v. Hurst (C. C. A. 5th) 228 Fed. 280, 284, 142 C. C. A. 572. Obviously, therefore, the public already has competition to the fullest extent desirable, not a competition entailing the waste of duplication and overlapping effort in marketing the product, with sporadic price-cutting of an irrational sort, but the competition of many products, each independently seeking public favor, against one of like character, but slightly dif-

ferent. Is not each manufacturer now under the highest sort of pressure from without? Must it not be alert to discover new improvements and conveniences and to keep down to the minimum the cost of construction and distribution? It is a matter of public knowledge that fortunes are spent in advertising these competitive products, in an effort to attract and cultivate public favor. Under such conditions, will the public be benefited by requiring the manufacturer to assume the further burden of internal guerrilla competition, with the confusion and waste entailed thereby? It is futile to say that such a burden will fall not upon the manufacturer or the public, but upon the local dealer or distributor. If there were ten dealers selling Ford cars in Portland, where there is now but one, would not the expense of marketing be greatly increased, and if, as is contended, the contract under consideration is harsh to the 'dealer', does it not follow that, with the trade divided into ten parts, and with the expense of rentals and personal service multiplied, the price of the car to the public would increase? Does any one suppose that such dealers would for any considerable length of time cut the price? In the light of experience is it not so probable as virtually to amount to a certainty that the prices would soon reach a common level, and that level would be higher than the present one? Upon the other hand, will the public not have the benefit of the freest and most effective competition if each patentee manufacturer of automobiles is permitted to market his product in his own way? May it not be assumed that, impelled by considerations of self-interest, he will select the most economical method, and that the keen and vigorous competition of innumerable other manufacturers will force him to give to the public the major benefit arising from his economies?"

In keeping with the principles enumerated in the *Ford* case, the courts have consistently held that the failure to

renew dealership contracts, whether pursuant to an agreement or "conspiracy" with other dealers or because the dealer whose franchise was not renewed refused to deal solely in the products of the automobile manufacturer, does not amount to a violation of the Sherman Act. See for example:

Packard Motor Car Company v. The Webster Motor Car Company (D. C. Cir., 1957), 243 F. 2d 418;

Hudson Sales Corporation v. Waldrip (5 Cir., 1954), 211 F. 2d 268, cert. den. 348 U. S. 821;

Feddersen Motors v. Ward (10 Cir., 1950), 180 F. 2d 519;

Riedly v. Hudson Motor Car Co. (W. D. Ky. 1949), 82 F. Supp. 8;

See also, *Boro Hall Corp. v. General Motors Corp.* (2 Cir., 1942), 124 F. 2d 822.

In addition to the automobile dealership cases cited above, there are many other cases to the same effect but involving other products, that is, cases holding that the anti-trust laws were not violated notwithstanding the charge of concerted action resulting in franchise agreements or selling arrangements being interfered with, cancelled, or not renewed. See, for example, the following cases:

Fargo Glass & Paint Co. v. Globe American Corp. (7 Cir., 1953), 201 F. 2d 534; cert. den., 345 U. S. 942;

Nelson Radio & Supply Co., Inc. v. Motorola Inc (5 Cir., 1952), 200 F. 2d 911; cert. den., 345 U. S. 925;

Shotkin v. General Electric Co. (10 Cir., 1948), 171 F. 2d 236;

Brosious v. Pepsi-Cola Co. (3 Cir., 1946), 155 F. 2d 99;

Neumann v. Bastian-Blessing Co. (N. D. Ill. 1946), 71 F. Supp. 803;
Abouaf v. J. D. & A. B. Spreckels Co. (N. D. Cal. 1939), 26 F. Supp. 830;
Arthur v. Kraft-Phenix Cheese Corp. (D. C. Md. 1938; CHESNUT, J.), 26 F. Supp. 824.

Ordinary common sense would seem to support the unanimous view of the judges who have considered the allegations of the amended complaint in the present case. It is difficult to understand how such a transaction as that described in the amended complaint could possibly be a violation of the anti-trust laws. Manufacturers are constantly confronted with a choice of the methods to be used in marketing their own products. It would interfere intolerably with the normal conduct of business to say that one of them may not agree, at the suggestion or request of a dealer, to limit the number of its dealers in a single community even though the result may be the elimination of one or more existing dealerships. As Judge EDGERTON truly observed in the *Packard* case (243 F. 2d 418, at p. 421):

> "To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it."

In summary, the amended complaint clearly discloses that the only thing of which the petitioner really complains is that it is no longer a Hudson dealer. The petitioner feels that its last one-year franchise should have been renewed and, in effect, it is asking this Court to convert such agreement into a perpetual dealership which cannot be terminated by Hudson except at the risk of an antitrust violation. This same situation was dealt with by the Court of Appeals for the Fifth Circuit in *Hudson Sales Corporation v. Waldrip*, 211 F. 2d 268 (cert. den. 348 U. S. 821) in which the court stated (at p. 274):

> "Plaintiff had no tenure, no right to a renewal of his contract as master dealer. Defendant, on the other hand, had an absolute right either to renew or not to renew it, and the exercise by it of that right did not, it could not form the basis of a suit under Section 15, even if the evidence had shown, which it did not, that the defendant had done so only because plaintiff had refused to give up in the future his other agencies and center his efforts on, and give his undivided attention to, Hudson and Hudson products."

Recognizing the essentially private nature of the instant suit, the District Court dismissed the amended complaint without leave to amend, relying upon the numerous cases which have held the private right of action under the anti-trust laws to be merely an aid in the enforcement of the overriding public policy established by such laws and not to be a right to enforce private claims not related to the invasion of such public rights.[10]

---

[10] *Kinnear-Weed Corp. v. Humble Oil & Refining Co.* (5 Cir. 1954), 214 F. 2d 891, 893; *Glenn Coal Co. v. Dickinson Fuel Co.* (4 Cir. 1934), 72 F. 2d 885; *Hudson Sales Corp. v. Waldrip* (5 Cir. 1954), 211 F. 2d 268, 273-4, cert. den. 348 U. S. 821 (1954); *Feddersen Motors, Inc. v. Ward* (10 Cir. 1950), 180 F. 2d 519, 522; *Riedley v. Hudson Motor Car Company* (W. D. Ky. 1949), 82 F. Supp. 8, 10; *Arthur v. Kraft-Phenix Cheese Corporation* (D. Md. 1938), 26 F. Supp. 824, 825-6, 828; *Interborough News Co. v. Curtis Publishing Co.* (S. D. N. Y. 1954) 127 F. Supp. 286, 301, aff'd. 225 F. 2d 289 (2d Cir. 1955); *Dublin Distributors, Inc. v. Edward & John Burke, Limited* (S. D. N. Y. 1952), 109 F. Supp. 125, 127-8; *District of Columbia Citizen Pub. Co. v. Merchants & Manufacturers Assn., Inc.* (D. C. D. C. 1949), 83 F. Supp. 994, 997.

CONCLUSION

Petitioner is seeking in this case to extend the anti-trust laws far beyond any scope previously given them by the decisions of this Court or of any of the lower Federal courts. Its contentions have been thoroughly discussed and ably dealt with in the courts below as well as in the *Packard* case recently decided by the Court of Appeals for the District of Columbia previously discussed. The respondents respectfully submit that no useful purpose can be served by granting the writ of certiorari in this case.

Respectfully submitted,

WILLIAM L. MARBURY,
JOHN MARTIN JONES, JR.,
RICHARD W. LARWIN,
Attorneys for Hudson Sales Corporation, Hudson Motor Car Company and Frank Burnham, Respondents.